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Public Prosecutor v Ahmad Firdaus bin Zulkifli

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO C-05(LB)-102–02 OF 2016
AHMADI ASNAWI, NALLINI PATHMANATHAN AND KAMARDIN HASHIM JJCA
25 JANUARY 2017

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Criminal Procedure — Appeal — Appeal against acquittal and discharge — Respondent charged with offences under ss 39B(1)(a) and 12(2) of the Dangerous Drugs Act 1952 ('the DDA') — Whether custody and control of drugs proven — Whether learned judicial commissioner failed to consider material evidence in acquitting and discharging respondent — Whether respondent succeeded in rebutting presumption of trafficking under s 37(da) of the DDA on balance of probabilities — Whether learned judicial commissioner erred in revisiting its earlier finding upon which he called defence without adducing fresh evidence

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Evidence — Similar fact evidence — Admissibility — Similar types of drugs found in respondent's car and house — Similar mode of keeping drugs both in car and house — Respondent found guilty for offence of possession in relation to drugs found in car — Learned judicial commissioner acquitted and discharged respondent for offence of trafficking in relation to drugs found in house — Whether similar fact evidence admissible — Whether learned judicial commissioner had misdirected himself — Evidence Act 1950 s 15 — Penal Code ss 37(da) & 39B(1)(a)

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The respondent was charged with the offences under ss 39B(1)(a) ('the first charge') and 12(2) ('the second charge') of the Dangerous Drugs Act 1952 ('the DDA'). The prosecution's case was that, the drugs which formed the subject matter of the second charge were found under a driver seat of a car driven by the respondent. As for the first charge, the drugs were found in a back room of a house rented by the respondent together with three others namely Mohd Syafiq ('SP11'), Azhar and Mat Nyek. The respondent was found guilty of the second charge and sentenced to three and a half years imprisonment and three strokes of rotan. As for the first charge, at first, the learned judicial commissioner ('the learned JC') found that the prosecution had made out prima facie case against the respondent as the prosecution had proved the element of possession, hence, His Lordship invoked the presumption of trafficking under s 37(da)(xvi) of the DDA. However, at the end of the defence's case, the learned JC found that the respondent had succeeded in rebutting the presumption of trafficking under

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s 37(da)(xvi) of the DDA on the balance of probabilities and the respondent was thus acquitted and discharged of the offence of trafficking as stated in the first charge. In relation to this, the learned JC relied on the evidence of the investigating officer ('SP12') and the respondent's mother ('SD2') that when both of them went to the said house, they found that the door was not locked. This prompted the learned JC to make finding that there was a possibility that either SP11, Mat Yek or Azhar had the keys to the said house and thereby had access to the said house. Aggrieved by the decision, the prosecution filed the present appeal. The main grounds of appeal raised by the prosecution were that: (a) custody and control of the impugned drugs found in the said house had been proven against the respondent; (b) the learned JC erred when he had placed too much reliance on the evidence of SP12 and SD2 to negate the element of exclusive possession on the part of the respondent; and (c) the learned JC erred when he held that the defence had succeeded in rebutting the presumption of trafficking under s 37(da) of the DDA on the balance of probabilities.

Held, allowing the appeal, setting aside the order of acquittal and discharge in respect of the first charge and substituting it with an order of conviction and sentencing the respondent to death by hanging:

(1) The learned JC erred in his finding on the issue of access by others to the said house. On the facts, SP11 had left the said house in May 2014 and the said house was continuously occupied by the respondent. As to the evidence of SP12 that the door was not locked, SP12 went to the said house on the 17 July 2012, two days after the incident and SD2 went to the said house on the same day after the respondent was arrested. The evidence before the court showed that the said house was barren at the time of the police raid. There was no sign that the said house had been inhibited by Mat Nyek and Azhar (see para 18).

(2) The learned JC had failed to consider other material evidence against the respondent which were: (a) the clothing found from the same room where the impugned drugs were recovered which fits the respondent well; (b) that the respondent had borrowed a motorcycle from one Ahmad Fakhurrazi prior to the incident and had kept the said motorcycle in the said house which supported the contention that the said house was solely occupied by the respondent; and (c) the similar fact evidence ie the similar types of drugs found in the car and the house and similar mode of keeping the drugs both in the car and the house. The similar fact evidence was admissible to show possession and knowledge on the part of the respondent of the drugs found in the said house. The learned JC had misdirected himself on this issue which amounted to a non-direction, sufficient to warrants appellate intervention (see paras 19, 25 & 27).

(3) There was no hard evidence to support the learned JC's finding that the respondent had succeeded in rebutting the presumption of trafficking under s 37(da) of the DDA on the balance of probabilities. The learned JC had failed to sufficiently re-evaluate the prosecution evidence at the end of the case and his finding was so perverse with his earlier finding. The learned JC erred in revisiting his earlier findings upon which he called for the defence eventhough there was no fresh evidence adduced by the defence regarding the issue on access by others of the said house (see paras 29 & 32–33).

[Bahasa Malaysia summary

Responden telah dituduh dengan kesalahan di bawah ss 39(1)(a) ('tuduhan pertama') dan 12(2) ('tuduhan kedua') Akta Dadah Berbahaya 1952 ('ADB'). Kes pendakwaan adalah bahawa, dadah yang membentuk perkara pokok terhadap tuduhan kedua didapati di bawah tempat duduk pemandu sebuah kereta yang dipandu oleh responden. Berkaitan dengan pertuduhan pertama, dadah dijumpai di bilik belakang sebuah rumah yang disewa oleh responden bersama-sama dengan tiga orang lain iaitu Mohd Syafiq ('SP11'), Azhar dan Mat Nyek. Responden didapati bersalah untuk tuduhan kedua dan dihukum tiga setengah tahun penjara dan tiga sebatan rotan. Untuk tuduhan pertama, pada mulanya, pesuruhjaya kehakiman yang bijaksana ('PK') mendapati bahawa pendakwaan telah membuat kes prima facie terhadap responden kerana responden telah membuktikan elemen pemilikan, maka, Yang Arif menggunakan anggapan pengedaran di bawah s 37(da)(xvi) ADB. Walau bagaimanapun, pada akhir kes pembelaan, PK yang bijaksana mendapati bahawa responden telah berjaya menyangkal anggapan pengedaran di bawah s 37(da)(xvi) ADB atas imbangan kebarangkalian dan responden dengan itu telah dibebaskan dan dilepaskan daripada kesalahan pengedaran seperti yang dinyatakan di tuduhan pertama. Berkaitan dengan ini, PK yang bijaksana bergantung kepada keterangan pegawai penyiasat ('SP12') dan ibu responden ('SD2') bahawa apabila kedua-dua mereka masuk ke rumah tersebut, mereka mendapati bahawa pintu tidak berkunci. Ini mendorong PK yang bijaksana untuk membuat dapatan bahawa terdapat kemungkinan sama ada SP11, Mat Nyek atau Azhar mempunyai kunci rumah dan dengan itu mempunyai akses terhadap rumah tersebut. Terkilan dengan keputusan tersebut, pendakwaan memfailkan rayuan ini. Sebab utama rayuan yang dibangkitkan oleh pendakwaan adalah bahawa: (a) jagaan dan kawalan dadah yang dipersoalkan didapati dalam rumah tersebut telah dibuktikan terhadap responden; (b) PK yang bijaksana terkhilaf apabila beliau terlalu bergantung kepada keterangan SP12 dan SD2 untuk menafikan elemen pemilikan ekslusif oleh pihak responden; dan (c) PK yang bijaksana terkhilaf apabila beliau memutuskan bahawa pembelaan telah berjaya mematahkan anggapan pengedaran di bawah s 37(da) ADB atas imbangan kebarangkalian.

Diputuskan, membenarkan rayuan, mengetepikan perintah pembebasan dan

pelepasan berkaitan dengan tuduhan pertama dan menggantikannya dengan perintah sabitan dan menjatuhkan hukuman gantung sampai mati ke atas responden:

(1) PK yang bijaksana terkhilaf dalam dapatannya atas isu akses oleh orang lain terhadap rumah tersebut. Atas fakta, SP11 telah meninggalkan rumah tersebut pada Mei 2014 dan rumah tersebut terus diduduki oleh responden. Berkaitan dengan keterangan SP12 bahawa pintu tidak berkunci, SP12 pergi ke rumah tersebut pada 17 Julai 2012, dua hari selepas insiden dan SD2 pergi ke rumah tersebut pada hari yang sama selepas responden ditangkap. Keterangan di hadapan mahkamah menunjukkan bahawa rumah tersebut telah ditinggalkan sewaktu serbuan. Tidak terdapat tanda bahawa rumah tersebut telah dihalang oleh Mat Nyek dan Azhar (lihat perenggan 18).

(2) PK yang bijaksana gagal untuk mempertimbangkan keterangan material lain terhadap responden iaitu: (a) pakaian yang dijumpai daripada bilik yang sama di mana dadah yang dipersoalkan telah ditemui yang mana muat dipakai oleh responden; (b) bahawa responden telah meminjam sebuah motosikal daripada seorang bernama Ahmad Fakhurrazi sebelum insiden dan telah menyimpan motosikal tersebut dalam rumah yang mana menyokong hujah bahawa rumah tersebut hanya diduduki oleh responden sahaja; dan (c) fakta keterangan sama iaitu dadah jenis sama didapati di dalam kereta dan rumah dan cara penyimpanan dadah yang sama di dalam kedua-dua kereta dan rumah. Fakta keterangan sama adalah boleh diterima untuk menunjukkan milikan dan pengetahuan di pihak responden terhadap dadah yang dijumpai di dalam rumah tersebut. PK yang bijaksana telah tersalah arah dirinya dalam isu ini yang terjumlah sebagai salah arah, mencukupi untuk mewajarkan campur tangan rayuan (lihat perenggan 19, 25 & 27).

(3) Tiada keterangan kukuh untuk menyokong dapatan PK yang bijaksana bahawa responden atas imbangan kebarangkalian telah berjaya menyangkal anggapan pengedaran di bawah s 37(da) ADB. PK yang bijaksana gagal untuk menilai semula dengan cukup keterangan pendakwaan di akhir kes dan dapatannya adalah sangat bertentangan dengan dapatan awalnya. PK yang bijaksana terkhilaf dalam merujuk semula dapatan awalnya di mana beliau memanggil pembelaan walaupun tidak terdapat bukti baru dikemukakan oleh pihak pembelaan mengenai isu akses oleh orang lain terhadap rumah tersebut (lihat perenggan 29 & 32–33).]

Notes

For cases on admissibility of similar fact evidence, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2993–2995.

For cases on appeal against acquittal and discharge, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 223–228.

Cases referred to

Amith Karinja v PP [2016] MLJU 1438; [2016] 1 LNS 420, CA (refd)
China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517; [1996] 3 CLJ 163, FC (refd)
Duis Akim & Ors v PP [2014] 1 MLJ 49; [2013] 9 CLJ 692, FC (refd)
Junaidi bin Abdullah v PP [1993] 3 MLJ 217; [1993] 3 CLJ 201, SC (refd)
Mohammad bin Abdullah v PP [2011] 4 MLJ 549, CA (refd)
P'ng Hun Sun v Dato' Yip Yee Foo [2013] 6 MLJ 523; [2013] 1 LNS 320, CA (refd)
PP v Denish a/l Madhavan [2009] 2 MLJ 194; [2009] 2 CLJ 209, FC (refd)
PP v Hamid Shamsi Kavishashi [2015] MLJU 2251; [2015] 3 CLJ 789, CA (refd)
PP v Zulkifli bin Arshad [2011] 1 MLJ 599; [2010] 6 CLJ 121, FC (refd)
Tan Kim Ho & Anor v PP [2009] 3 MLJ 151; [2009] 3 CLJ 236, FC (refd)
Wong Joo Sen v PP [2011] 1 MLJ 581; [2010] 8 CLJ 392, FC (refd)
Wong Yew Ming v PP [1991] 1 MLJ 31, SC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 6, 12(2), 37(da), (da)(xvi), 39A(2), 39B(1)(a)
Evidence Act 1950 s 15

Hanim bt Mohd Rashid (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Bob Arumugam (Bob S Arumugam & Co) for the respondent.

Kamardin Hashim JCA (delivering judgment of the court):

[1] The respondent was charged before the High Court at Kuantan with two charges. The first charge was under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'), and the second, under s 12(2) of the Act. The charges read as follows:

> The first charge:
> Bahawa kamu pada 15 Julai 2014, jam lebih kurang 3.45 pagi, di rumah beralamat No 56, Lorong Padang Permai 41, Jalan Sungai Lembing di dalam Daerah Kuantan, di dalam Negeri Pahang Darul Makmur, telah mengedar dadah berbahaya iaitu berat bersih 55.51 gram Methamphetamine dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.
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> The second charge:
> Bahawa kamu pada 15 Julai 2014, jam lebih kurang 3.45 pagi, di tepi jalan hadapan

A rumah beralamat No 56, Lorong Padang Permai 41, Jalan Sungai Lembing di dalam Daerah Kuantan, di dalam Negeri Pahang Darul Makmur, telah didapati dalam kawalan kamu dadah berbahaya seberat 28.88 gram Methamphetamine dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 12(2) Akta Dadah Berhabaya 1952 dan boleh dihukum di bawah Seksyen 39A(1) Akta yang sama.

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[2] At the end of the trial, the respondent was convicted on the second charge and he was sentenced to three years six months imprisonment and three strokes of the rotan. As to the first charge, the respondent was acquitted and discharged after his defence had been called.

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[3] Aggrieved, the public prosecutor appealed to this court against the acquittal of the first charge. After hearing the parties, we allowed the appeal. We now give our grounds.

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THE PROSECUTION'S CASE

[4] The case for the prosecution is as follows. The respondent was detained in an operation on 15 July 2014 at about 3.45am by a police team led by Insp Izwan Hafees bin Mukhtar ('PW9') in a Suzuki Swift car bearing registration No BKV462 ('the said car') in front of house No 56, Lorong Padang Permai 41, Jalan Sg Lembing, Kuantan ('the said house'). The respondent was the driver of the said car. The other three occupants of the said car were also detained at the same time. They were Muhammad Rafiq bin Othman ('PW5'), Ahmad Fakhurrazi bin Zakaria ('PW6') and a lady companion of the respondent, Shafinaz bt Bidin, who was seated in the front passenger seat next to the driver's seat.

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[5] Nothing incriminating was found from the persons of all the occupants of the said car including the respondent. But upon checking the said car, PW9 recovered a newspaper package tied with rubber band hidden under the driver seat. Upon further checking, the newspaper package was found to contain 200 pills with a 'WY' logo on each of them, suspected to be dangerous drugs, the subject matter of the second charge. The respondent and the other three occupants of the said car were immediately arrested.

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[6] SP9 also recovered a bunch of keys from a compartment in between the handrest of the driver's seat and the front passenger seat. On questioning, the respondent answered that the keys were for the said house No 56, Lorong Padang Permai 41, Jalan Sg Lembing, Kuantan. SP9 then brought all the arrested persons to the said house. Using the keys recovered from the said car, SP9 managed to enter the said house.

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[7] In a room at the back portion of the said house, SP9 discovered a 'Clarks Original' shoe box lying on the floor. When opened, the shoe box was found to contain a newspaper package tied with a rubber band. On further checking, SP9 discovered the newspaper package to contain 3,971 pills with a 'WY' logo on each of them, suspected to be dangerous drugs. Also recovered in the shoe box, was a digital scale carrying the 'CONSTANT' brand name. From the same room, SP9 also confiscated a pair of 'GUESS' jeans and an 'A/X' t shirt.

[8] The 200 pills recovered from the said car and the 3,971 pills recovered from the shoe box in the said house were later sent to the chemist, Suraini bt Mat Yasin ('PW7') for analysis. Upon analysis, PW7 confirmed that the 200 pills recovered from the car contained a total of 28.88g of methamphetamine ('the second charge'). Whereas the 3,971 pills recovered from the shoe box contained a total of 55.51g of methamphetamine, the subject matter of the trafficking charge.

FINDING OF THE TRIAL JUDGE AT THE END OF THE PROSECUTION'S CASE

[9] At the close of the prosecution's case, learned judicial commissioner ('learned JC') found that the respondent had custody and control of the impugned drugs found inside the said car based on the evidence given by the prosecution's witnesses. As regards the drugs recovered from the shoe box in the said house, the learned JC relied on the testimony of Mohd Shafiq bin Alias ('PW11') who was the tenant of the said house, as well as the evidence given by the investigating officer, Insp Hafizey bin Hassan ('PW12') and the testimony of SP9, the arresting officer. The learned JC held that the prosecution had established a prima facie case against the respondent on the trafficking charge. In his grounds of judgment, the learned JC held (at pp 16–18 AR Vol 1):

> [17] Selepas menahan dan pemeriksaan kereta di hadapan rumah No 56, Lorong Padang Permai 41, Jalan Sungai Lembing Kuantan, SP9 dengan dipandu arah oleh tertuduh pergi ke rumah tersebut. Dengan menggunakan kunci yang dirampas dari dalam kereta tertuduh, SP9 dan anggotanya bersama tertuduh telah masuk ke dalam rumah dan menjumpai dadah di dalam bilik belakang rumah yang tersimpan di dalam satu kotak bertanda 'Clarks Original'.
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> [18] Bagi membuktikan tertuduh mempunyai milikan atas tuduhan dadah yang dijumpai di dalam rumah, pihak pendakwaan perlu membuktikan kawalan dan jagaan terhadap rumah tersebut oleh tertuduh dan membuktikan tertuduh mempunyai pengetahuan mengenainya. Dari keterangan pihak pendakwaan rumah tersebut dimiliki oleh Puan Marlina bt (sic) Mohd Salleh ('SP2'). Walau bagaimanapun SP2 mengatakan rumah tersebut telah disewakan kepada Mohd Shafiq bin Alias ('SP11') sepertimana perjanjian sewa diekshibit P10. Sementara itu SP11 beliau menyewa rumah tersebut daripada SP2 dan beliau telah keluar daripada rumah berkenaan pada pertengahan bulan Mei 2014. Beliau tinggal

bersama tertuduh, Mak Nyit dan Azhar. Semasa meninggalkan rumah apa yang SP11 pastikan tertuduh mendiami rumah tersebut. Dari keterangan ini, ditambah lagi dengan keterangan SP9 yang membuka kunci mangga pintu *grill* menggunakan kunci yang dirampas dari dalam kotak letak tangan dalam kereta BKV462 menunjukkan tertuduh mempunyai kawalan dan jagaan terhadap rumah tersebut.

[19] Keterangan SP9 menemui dan merampas sehelai seluar jeans jenama GUESS bersaiz 28 dan satu helai baju t jenama A/X bersaiz S yang dijumpai di atas lantai berhampiran barang kes di bilik yang sama yang kemudian dibuat acupakai ke atas Tertuduh oleh pegawai penyiasat SP12. SP12 telah mengarahkan gambar acu pakai dirakamkan seperti gambar P14(1–2). Dari keterangan SP12 dan gambar acupakai menunjukkan pakaian-pakaian tersebut sesuai dengan saiz tubuh badan tertuduh. Seterusnya menurut keterangan SP12 melalui siasatannya mendapati rumah, bilik-bilik dan ruang-ruang dalam rumah itu tidak ada barang-barang. Dengan kata lain rumah tersebut adalah rumah kosong. Semasa siasatan beliau, beliau menemui satu *envelope* Berjaya Foto & Trading ('P37(A)') yang mengandungi dua keping gambar tertuduh ('P37(A)(1)–(2)') di bilik belakang dimana dadah dijumpai.

[20] Dari keterangan SP9 berhubung suai muatnya pakaian baju t dan seluar yang dirampas dengan saiz tubuh badan tertuduh dan penemuan gambar-gambar tertuduh di bilik di mana dadah dijumpai serta ketiadaan barang-barang lain di rumah tersebut jelas menunjukkan tiada siapa lagi yang tinggal dan menghuni rumah tersebut kecuali tertuduh. Keterangan ini diperkuatkan lagi dengan kunci yang dijumpai dalam kereta tertuduh yang boleh membuka *grill* rumah tersebut. Dengan itu keterangan bahawa tertuduh mempunyai kawalan dan jagaan rumah tersebut. Tiada keterangan yang menunjukkan ia boleh diakses oleh orang lain membuktikan tertuduh mempunyai kawalan dan jagaan ekslusif terhadap dadah yang dijumpai di bilik belakang rumah berkenaan. Tentunya tertuduh mempunyai pengetahuan mengenai kewujudan dadah-dadah tersebut. Oleh itu mahkamah ini mendapati tertuduh mempunyai pemilikan ekslusif terhadap dadah-dadah yang dijumpai di dalam rumah tersebut. Memandangkan jumlah berat dadah melebihi berat yang ditetapkan, maka tertuduh adalah dianggap mengedar dadah seperti peruntukan s 37(da) Akta Dadah Berbahaya 1952.

[10] Having found that the prosecution had proved the element of possession, the learned JC invoked the presumption of trafficking under s 37(da)(xvi) of the Act. After being satisfied that all the elements of the charges had been established, the learned JC held that the prosecution had proven a prima facie against the respondent on both the charges proffered. Thus, the respondent was directed to enter his defence on both the charges.

THE DEFENCE

[11] The respondent elected to give evidence under oath. According to the respondent he was arrested when he stopped the car he was driving in front of the said house. There were a few police officers together with SP11, who was handcuffed. The police later took him into his house. The sliding door and the

grill were not locked. It was the respondent's testimony that the police went straight to the store room at the back of the house where they found the drugs inside the shoe box. The respondent further said that the police brought him back to the said car where the police found drugs inside the car after searching the car.

[12] It was also the testimony of the respondent that he stayed in the said house together with SP11, Azhar and Mat Nyek. He paid RM200 per month as rental and that he occupied the third room, whereas Azhar occupied the master bedroom and SP11 stayed in the second room. When SP11 left the said house in the middle of May 2014, Mat Nyek stayed in the second room. The fourth room where the drugs was found by the police was used as a store room. The house was furnished with a television and sofa set, all belonging to SP11. There was a cupboard as well as mattresses inside the third room occupied by him. When he was under remand all his belongings in the said house were collected by his mother, Maznah bt Jusuh ('SD2').

[13] The learned trial judge after considering the respondent's version, found that the respondent had succeeded in raising a reasonable doubt on the prosecution's case in respect of the trafficking charge. The learned trial judge held that the defence had also succeeded in rebutting the presumption of trafficking under s 37(da)(xvi) of the Act on the balance of probabilities. The respondent was thus acquitted and discharged of the trafficking charge. Hence the appeal before us.

THE APPEAL

[14] Before us learned deputy public prosecutor ('learned deputy') canvassed three main grounds of appeal, namely:

(a) custody and control of the impugned drugs found in the said house had been proven against the respondent;

(b) the learned JC erred when His Lordship had placed too much reliance on the evidence of SP12 and SD2 to negate the element of exclusive possession on the part of the respondent; and

(c) the learned JC erred when His Lordship held that the defence had succeeded in rebutting the presumption of trafficking under s 37(da) of the Act on the balance of probabilities.

OUR DECISION

[15] The crux of the learned deputy complaints was mainly centred on the learned JC's findings of fact and on the evaluation of the evidence laid before him. The position of the law on this aspect had been decided and well settled.

There are plethora of cases on this point such as *Tan Kim Ho & Anor v Public Prosecutor* [2009] 3 MLJ 151; [2009] 3 CLJ 236; *Public Prosecutor v Hamid Shamsi Kavishashi* [2015] MLJU 2251; [2015] 3 CLJ 789; *Wong Joo Sen v Public Prosecutor* [2011] 1 MLJ 581; [2010] 8 CLJ 392; *P'ng Hun Sun v Dato' Yip Yee Foo* [2013] 6 MLJ 523; [2013] 1 LNS 320; *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163.

[16] The recent decision of the Court of Appeal on the same issue in *Amith Karinja v Public Prosecutor* [2016] MLJU 1438; [2016] 1 LNS 420, held as follows:

> [15] The issue before us is relatively simple, and that is, whether the learned trial judge was right in arriving at these findings of fact. If these findings are not perverse or are not plainly wrong, then our duty is to affirm his decision and dismiss the appeal.
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> [19] An appellate court's approach in dealing with fact based appeals both in civil and criminal cases is well settled. There is no dearth of authority on the point but we find the following observations by Raja Azlan Shah FJ (as His Royal Highness then was) in *Samar binte Mansor v Mustafa Kamarul Ariffin* [1974] 2 MLJ 71; [1974] 1 LNS 147 to be most illuminating. This is what His Lordship said in delivering his minority judgment (the majority being Suffian LP and Ali FJ):
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> > For an appellant to succeed in an appeal against a finding of fact made by a single Judge, he must convince the appellate Court that the learned Judge was wrong in his conclusion. That the appeal may be by way of re-hearing does not alter the situation. A hearing is not, however, a retrial of the issues.
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> > The question is not whether an appellate court can substitute its view of the facts which of course it is empowered to do so, but whether it should do so. However much an appellate court may be in an equal position with the trial judge as to the drawing of inferences, it ought not to reverse the findings of fact unless it is convinced that they are wrong. It is not whether the inferences are right but whether an appellate court is convinced that they are wrong. If that finding is a view reasonably open on the evidence, it is not enough to warrant its reversal just because an appellate court would have come to a different view. Merely differing views do not establish that either view is wrong, but in balancing these two views an appellate court should give due weight to the nature of the facts as found by the trial judge.

[17] In respect of the first and second grounds of appeal, the learned deputy's complaint was based on the adverse finding of the learned JC on the possibility of others who had access to the said house especially SP11, Mat Nyek and Azhar. The learned JC relied on the evidence of SP12 and SD2 that when both the witnesses went to the said house, they found that the door to the said house was not locked. This prompted the learned JC to make a finding that there was

a possibility that either SP11, Mat Nyek or Azhar had the keys to the said house and thereby had access to the said house. The learned JC held that there was a doubt in the prosecution case. At p 24 AR Vol 1, the learned JC said:

> [34] Dari keterangan ini, jelas cerita tertuduh mengenai rumah tersebut turut didiami oleh Azhar dan Mat Nyek serta SP11 turut mempunyai kunci dan keterangan bahawa dua keping gambar beliau tidak ada di bilik berhampiran kotak dimana dadah dijumpai berkemungkinan besar ada kebenarannya telah menimbulkan keraguan atas kes pihak pendakwaan mengenai pemilikan dadah tersebut. Oleh itu mahkamah ini mendapati tertuduh telah berjaya dalam keterangannya menimbulkan keraguan yang munasabah atas kes pihak pendakwaan bagi dadah-dadah yang dijumpai di dalam rumah itu. Dalam masa yang sama tertuduh juga telah berjaya atas imbangan kebarangkalian mematah anggapan pengedaran di bawah s 37(da) Akta Dadah Berbahaya 1952.

[18] We were in agreement with the learned deputy's submission that the learned JC erred in his finding on the issue of access by others to the said house. We found that SP11 had left the said house in May 2014 and the said house was continuously occupied by the respondent. As to the evidence of SP12 that the door was not locked, SP12 went to the said house on the 17 July 2012, two days after the incident and SD2, the mother of the respondent went to the said house on the same day after the respondent was arrested. The evidence before the court shows that the said house was barren at the time of the police raid. There was no sign that the said house had been inhibited by Mat Nyek and Azhar. Nothing was discovered to show that the two had occupied the said house together with the respondent.

[19] We agreed that the learned JC had failed to consider other material evidence against the respondent. Firstly, that there were clothings found from the same room where the impugned drugs were recovered which fits the respondent well. Secondly, that prior to the incident, the respondent had borrowed Ahmad Fakhurrazi bin Zakaria's ('SP6') motorcycle and on the night in question SP6 was together in the said car, fetched by the respondent earlier, to retrieve his motorcycle which was kept by the respondent in the said house. This evidence lends support to the contention that the said house was solely occupied by the respondent. The other material evidence overlooked by the learned JC was on the issue of similar fact evidence.

[20] On the issue of similar facts, we refer to s 15 of the Evidence Act 1950, which provides as follows:

> Facts bearing on question whether act was accidental or intentional
>
> When there is a question whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that the act formed part of series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

ILLUSTRATIONS

(i) A is accused of burning down his house in order to obtain money for which it is insured.
The facts that A lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of which fires A received payment from a different insurance office, are relevant as tending to show that the fire was not accidental.

(ii) A is employed to receive money from the debtors of B. It is A's duty to make entries in a book showing the amounts received by him. He makes an entry showing that on a particular occasion he received less than he really did receive.
The question is whether this false entry was accidental or intentional.
The facts that other entries made by A in the same book are false, and that the false entry is in each case in favour of A are relevant.

(iii) A is accused of fraudulently delivering to B a counterfeit ringgit.
The question is whether the delivery of the dollar was accidental.
The facts that soon before or soon after the delivery to B, A delivered counterfeit dollars to C, D and E are relevant as showing that the delivery to B was not accidental.

[21] In *Wong Yew Ming v Public Prosecutor* [1991] 1 MLJ 31, PW8 a self-confessed drug addict in his evidence said that he bought half a straw tube of drugs from the accused almost everyday on about twenty occasions and he paid RM45 on each occasion. The learned president of the sessions court held that the said additional evidence called by the prosecution is admissible to show system and that the accused is known to have been dealing with drugs. An appeal to the High Court was dismissed. Hence the following question of law of public interest was referred to the then Supreme Court:

> Whether in a trial in which the accused is charged for trafficking in respect of a particular quantity of dangerous drugs, to wit, heroin, at a particular place and time may be admitted that on previous occasion he had sold dangerous drugs, although such evidence is prejudicial to the accused.

[22] It was held by the Supreme Court that:

> In the context of the Act, PW8's evidence is in our view clearly admissible. The prosecution wanted to show that on previous occasions the applicant had sold drugs and therefore had been trafficking in drugs. In our law when the statutory amount of drugs is proved to be in the possession of any person the presumption is invoked and the person shall be presumed until the contrary is proved, 'to be trafficking' in the said drug. Under the Act possession of the statutory amount of drug is trafficking. PW8's evidence was relevant to show knowledge and that the possession of the drug by the applicant was not accidental.
>
> ...

In this case the evidence of PW8 is admissible not because it tends to show that a person committing one offence is likely to commit another but to show knowledge or intention of the applicant and that the possession is not accidental.

[23] Evidence of similar fact was also accepted by the Federal Court in *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217; [1993] 3 CLJ 201 where it was decided as follows:

Since this line of defence had already been indicated during cross-examination of DSP Mustaffa Kamil ('PW1'), we were of the view that the evidence of Tajuddin ('PW2') on the armed robbery in which the appellant was involved, was admissible in evidence to rebut that defence, on the principle enunciated in *Makin v Atorney-General for New South Wales* [1894] AC 57, where at p 65 the Privy Council speaking through Lord Herschell LC laid down the following principle on the admissibility of evidence of similar facts:

> In Their Lordship's opinion the principles which must govern the decision of the case are clear, though the application of them is by no means free from difficulty. It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused had been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other.

[24] The same issue was raised again in *Mohammad bin Abdullah v Public Prosecutor* [2011] 4 MLJ 549 where PW7 had testified that prior to that incident they had delivered cannabis to Abang Puchong. Learned counsel submitted that the evidence should not be admitted by the court as it was prejudicial to the appellant. It was held by the Court of Appeal that:

[57] In the present case we were of the view that the probative value of the similar fact evidence adduced through PW7 far outweighed its prejudicial effect. The evidence of PW7 was admissible not because it tends to show that a person committing one offence is likely to commit another offence but to show knowledge of intention of the appellant and that possession was not accidental (see *Wong Yew Ming v Public Prosecutor* [1991] 1 MLJ 31). As such we found that the evidence was rightly admitted by the learned trial judge.

[25] Back to the instant appeal at hand, the respondent was found guilty of another charge where drugs in similar packaging was found earlier hidden

under the driver's seat of a car driven by the respondent. Not only were they similar types of drugs but they were similar in the mode of keeping the drugs. SP9 described the drugs recovered from the said car in the following terms (at pp 94–95 AR Vol 2):

> 6. Kemudian dengan disaksikan oleh kesemua suspek, saya telah jalankan pemeriksaan di dalam kenderan tersebut, saya telah menjumpai di bawah tempat duduk pemandu (1) balutan keratan kertas surat khabar bertarikh 13 Mei 2014 Selasa — yang berikat gegelung getah. Saya ambil balutan kertas surat khabar tersebut, buka dan periksa isi kandungan, didapati di dalamnya terdapat (1) bungkusan kertas warna kekuningan membaluti (1) paket plastik lutsinar yang mengandungi (10) paket plastik berwarna biru dimana setiap peket plastik biru tersebut berisi (198) biji pil warna kemerahan bertanda 'WY' disyaki dadah dan (2) biji pil warna kehijauan bertanda 'WY' disyaki dadah yang kesemuanya berjumlah sebanyak (200) biji pil. Saya rampas kesemua barang kes dan tangkap keempat-empat suspek setelah diberitahu sebab-sebab tangkapan dibuat dalam bahasa yang mudah difahami.

[26] As regard the impugned drugs in the present appeal before us, SP9's evidence is as follows (at pp 95–96 AR Vol 2):

> 8. Kemudian saya bersama pasukan serbuan terus masuk ke dalam rumah dan jalankan pemeriksaan di dalam rumah dengan disaksikan oleh keempat-empat suspek, saya telah menjumpai (1) kotak kasut berpenutup bertanda 'Clarks Originals' di atas lantai dalam bilik bahagian belakang. Kemudian saya buka dan periksa kotak tersebut di hadapan kesemua suspek dapati didalamnya mengandungi (1) balutan keratan kertas surat khabar bertarikh — 13 Mei 2014 Selasa — berikat gegelung getah di dalamnya mengandungi (1) bungkusan plastik lutsinar di dalamnya terdapat (10) peket plastik berwarna biru dimana setiap peket plastik biru tersebut berisi (198) biji pil warna kemerahan bertanda 'WY' disyaki dadah dan (2) biji pil warna kehijauan bertanda 'WY' disyaki dadah yang berjumlah sebanyak (200) biji pil dan (1) balutan kertas warna kekuningan berikut gegelung getah di dalamnya mengandungi (1) bungkusan plastik lutsinar di dalamnya terdapat (10) peket plastik berwarna biru dimana (9) peket plastik biru tersebut, setiap peket berisi (198) biji pil warna kemerahan bertanda 'WY' disyaki dadah dan (2) biji pil warna kehijauan bertanda 'WY' disyaki dadah dan (1) peket plastik biru berisi (170) biji warna kemerahan bertanda 'WY' disyaki dadah dan (1) biji pil warna kehijauan bertanda 'WY' disyaki dadah dan (1) alat penimbang digital bertanda — CONSTANT — jumlah keseluruhan pil-pil tersebut sebanyak (3,971) biji pil kesemuanya.

[27] There were similarities not only in the type of the drugs, but were also wrapped with newspaper cutting dated the same day, ie Tuesday the 13 May 2014, bound with rubber band, packed in yellowish paper where each package contained a transparent plastic packet and each plastic packet contained a plastic packet blueish in colour, each with 'WY' pills in various colours. Similar fact evidence, even though circumstantial in nature but nevertheless sufficiently strong to connect the respondent to the commission of the offence

charged, was simply ignored by the learned trial judge. This similar fact evidence is admissible to show possession and knowledge on the part of the respondent of the drugs found in the said house. We hold that the learned JC had misdirected himself on this issue which amounts to a non-direction, sufficient to warrants appellate intervention.

[28] To conclude on the same issue, we wish to refer to the case of *Public Prosecutor v Zulkifli bin Arshad* [2011] 1 MLJ 599; [2010] 6 CLJ 121 where the facts bore some similarities with the present appeal. In that case the respondent was convicted and sentenced to death by the High Court on two charges of trafficking in dangerous drugs. The first charge was related to trafficking in 5796.7g of cannabis found in a 'Nike' bag found at the rear passenger seat of a car registration No JCQ2852 driven by the appellant and the second charge was related to trafficking in 3,867.2g of cannabis found in the third room of a house No PS 31-3, Parit Senkuang, Jln Kluang, Sri Gading. Before the Court of Appeal, the respondent's appeal was partially allowed. The convictions under s 39B(1)(a) were substituted with that under s 6 read with s 39A(2) of the Act and the respondent was sentenced to 18 years imprisonment on each charge and also ordered to be given ten strokes of the rattan. On appeal by the public prosecutor, the Federal Court allowed the appeal and reinstated the decision of the High Court.

[29] We now move to the third ground of appeal in respect of the finding of the learned JC that the respondent had succeeded in rebutting the presumption of trafficking on the balance of probabilities. The learned deputy's complaint was based on the learned JC's finding that there is a possibility that others might have access to the said house. It was submitted that the learned JC finding was without any hard evidence and was merely based on mere conjecture. We have perused the evidence in the appeal records and we harboured no doubt but to agree with the learned deputy's contention. We found no hard evidence to support the learned JC's finding that the respondent had succeeded in rebutting the presumption of trafficking under s 37(da) of the Act on the balance of probabilities. We found that the learned JC had failed to sufficiently re-evaluate the prosecution evidence at the end of the case and his finding was so perverse with his earlier finding. We reproduce his earlier finding at the end of the prosecution's case evinced at pp 17–18 AR Vol 1:

> [18] Bagi membuktikan tertuduh mempunyai milikan atas tuduhan dadah yang dijumpai di dalam rumah, pihak pendakwaan perlu membuktikan kawalan dan jagaan terhadap rumah tersebut oleh tertuduh dan membuktikan tertuduh mempunyai pengetahuan mengenainya. Dari keterangan pihak pendakwaan rumah tersebut dimiliki oleh Puan Marlina bt (sic) Mohd Salleh ('SP2'). Walau bagaimanapun SP2 mengatakan rumah tersebut telah disewakan kepada Mohd Shafiq bin Alias ('SP11') sepertimana perjanjian sewa diekshibit P10. Sementara itu SP11 beliau menyewa rumah tersebut daripada SP2 dan beliau telah keluar daripada rumah berkenaan pada pertengahan bulan Mei 2014. Beliau tinggal

bersama tertuduh, Mak Nyit dan Azhar. Semasa meninggalkan rumah apa yang SP11 pastikan tertuduh mendiami rumah tersebut. Dari keterangan ini, ditambah lagi dengan keterangan SP9 yang membuka kunci mangga pintu *grill* menggunakan kunci yang dirampas dari dalam kotak letak tangan dalam kereta BKV 462 menunjukkan tertuduh mempunyai kawalan dan jagaan terhadap rumah tersebut.

[19] Keterangan SP9 menemui dan merampas sehelai seluar jeans jenama GUESS bersaiz 28 dan 1 helai baju t jenama A/X bersaiz S yang dijumpai di atas lantai berhampiran barang kes di bilik yang sama yang kemudian dibuat acupakai ke atas tertuduh oleh Pegawai Penyiasat SP12. SP12 telah mengarahkan gambar acu pakai dirakamkan seperti gambar P14(1–2). Dari keterangan SP12 dan gambar acupakai menunjukkan pakaian-pakaian tersebut sesuai dengan saiz tubuh badan tertuduh. Seterusnya menurut keterangan SP12 melalui siasatannya mendapati rumah, bilik-bilik dan ruang-ruang dalam rumah itu tidak ada barang-barang. Dengan kata lain rumah tersebut adalah kosong. Semasa siasatan beliau, beliau menemui satu *envelope* Berjaya Foto & Trading [P37(A)] yang mengandungi dua keping gambar tertuduh ('P37(A)(1)–(2)') di bilik belakang dimana dadah dijumpai.

[20] Dari keterangan SP9 berhubung suai muatnya pakaian baju t dan seluar yang dirampas dengan saiz tubuh badan tertuduh dan penemuan gambar-gambar tertuduh di bilik di mana dadah dijumpai serta ketiadaan barang-barang lain di rumah tersebut jelas menunjukkan tiada siapa lagi yang tinggal dan menghuni rumah tersebut kecuali tertuduh. Keterangan ini diperkuatkan lagi dengan kunci yang dijumpai dalam kereta tertuduh yang boleh membuka *grill* rumah tersebut. Dengan itu keterangan bahawa tertuduh mempunyai kawalan dan jagaan rumah tersebut. Tiada keterangan yang menunjukkan ia boleh diakses oleh orang lain membuktikan tertuduh mempunyai kawalan dan jagaan ekslusif terhadap dadah yang dijumpai di bilik belakang rumah berkenaan. Tentunya tertuduh mempunyai pengetahuan mengenai kewujudan dadah-dadah tersebut. Oleh itu mahkamah ini mendapati tertuduh mempunyai pemilikan ekslusif terhadap dadah-dadah yang dijumpai di dalam rumah tersebut. Memandangkan jumlah berat dadah melebihi berat yang ditetapkan, maka tertuduh adalah dianggap mengedar dadah seperti peruntukan s 37(da) Akta Dadah Berbahaya 1952.

[30] In *Public Prosecutor v Denish a/l Madhavan* [2009] 2 MLJ 194; [2009] 2 CLJ 209 the Federal Court had the opportunity to discuss on the same issue of access and exclusive possession. The apex court decided those issues in this way at pp 216–218 of the report:

[15] The question of others having access to the respondent's room was considered by the trial judge both after the close of the case for the prosecution and in evaluating the case after hearing the defence. The learned trial judge said that the matter of access by others was 'to negative the proof of exclusive possession'. Before us the respondent's counsel was candid enough as to what the respondent's aim was in seeking to show the probability of access by others as a matter negativing exclusive possession: it was to assert that the cannabis in the three bags under the bed could have been concealed or planted there by these other persons. The learned trial judge did not allow himself to be distracted by this suggestion of access by others from the evidence that he found to exist of 'exclusive' possession of the cannabis on the part

of the respondent. He did, nevertheless, make findings on the evidence relating to access by others. He found on the evidence that Boy had already ceased living at the house when it was raided. As regards Razali, he found there was no evidence that Razali had a set of the keys of the house although there was evidence that Razali had been entering the house to care for a hamster that was in a cage in the common or guest area.

[16] Before proceeding to consider the reasons for the Court of Appeal's decision, we will say a few words about 'exclusive' possession. It is inappropriate to speak of possession of an article in criminal law as exclusive possession. On is either in possession or not in possession, although one could be in possession jointly with another or others. To say that the prosecution of a drug case fails because there has been no proof of exclusive possession is apt to convey the wrong impression that it is only in cases where possession is entirely with one person, — that is, 'exclusive' — that a conviction is possible. When the learned trial judge said 'The accused sought to negative the proof of exclusive possession ...', we take it that he meant no more that the respondent sought to show that he was not in possession of the drugs because he had no knowledge of their existence and that the drugs could have been placed in his bags by some other person or persons.

[17] The idea of exclusivity features in the meaning of 'possession' in criminal law as one of the elements necessary to constitute possession. As Taylor J said in *Leow Nghee Lim v Reg* [1956] 1 MLJ 28:

> ... It is often said that 'possession must be exclusive'. This is ambiguous. Possession need not be exclusive to the accused. Two or more persons may be joint possession of chattels, whether innocent or contraband. The exclusive element of possession means that the possessor of possessors have the power to exclude other persons from enjoyment of the property.
>
> Custody likewise may be sole or joint and it has the same element of excluding others. The main distinction between custody and possession is that a custodian has not the power of disposal. The statement that 'possession must be exclusive' is often due to confusion of the fact to be proved with the evidence by which it is to be proved. It is essential to keep this distinction clearly in mind, especially when applying presumptions.

[18] Thomson J, in *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237, said that 'possession' for the purposes of criminal law involves possession itself — which some authorities term 'custody' or 'control' — and knowledge of the nature of the thing possessed. As to possession itself he cited the following definition in *Stephen's Digest* (9th Ed at p 304), in which the exclusive elements mentioned by Taylor J appears:

> A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

[19] Once the elements needed to constitute possession are established, including the element of exclusive power to deal, then what is established is possession, not exclusive possession. So much for exclusive possession.

[31] In *Public Prosecutor v Hamid Shamsi Kavishashi* [2015] MLJU 2251; [2015] 3 CLJ 789 this court in a similar situation had exercised its powers conferred under the law to reverse the trial judge's decision which is plainly wrong based on the totality of the evidence, the surrounding circumstances and the probabilities of the case to achieve justice as the end result. Justice Abdul Rahman Sebli JCA had this to say in that case:

> [60] Having regard to the totality of the evidence, the surrounding circumstances and the probabilities of the case, we do not think that justice had been done to the prosecution. It is our finding that contrary to the learned trial judge's finding, the trafficking charge had been proved beyond any reasonable doubt. In *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors* [2003] 1 CLJ 585 the Court of Appeal quoted with approval the following passage by *Lord Pearce in Onassis and Calogeropoulos v Vergottis* [1968] 2 Loyd's Rep 403 at p 430:
>
> > The function of a Court of Appeal is to set aside a judgment that should not be allowed to stand because it occasions a substantial wrong or miscarriage of justice. That wrong or miscarriage of justice may consist of a judgment in favour of the wrong party. It may also consist of a failure in the judicial process to which both parties are entitled as of right, namely, the weighing of their respective cases and contentions. Such failure may constitute a wrong or miscarriage of justice even though it may appear that the appellant may in the end fail to secure a judgment in his favour: but the fact that the right party seems to have succeeded in the court below will naturally make a Court of Appeal extremely reluctant to interfere, and it would only do so in the rarest of cases. Such matters are questions of degree.

[32] Before we conclude, we wish to make one final observation as to the finding of the learned JC at the end of the defence case. We found that the learned JC erred in revisiting his earlier findings upon which he called for the defence eventhough there was no fresh evidence adduced by the defence regarding the issue on access by others of the said house. On the same issue, the Federal Court in *Duis Akim & Ors v Public Prosecutor* [2014] 1 MLJ 49; [2013] 9 CLJ 692 has decided:

> [38] We note that when assessing the defence the learned trial judge surprisingly revisited his earlier findings upon which he called for the defence. Such approach is quite contrary to the principle of maximum evaluation of the evidence adduced at the close of the prosecution's case. Indeed in his judgment the learned trial judge made it very clear that he had conducted a maximum evaluation of the evidence adduced by the prosecution before calling for the defence.
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> [39] In *Public Prosecutor v Khong Soh* [1966] 2 MLJ 137 Macintyre J said this at p 139:
>
> > Having held that a prima facie case had been made out against the respondent, the learned president should have given his reasons for holding why the respondent's evidence had created a reasonable doubt in his mind.

[40] Thus, in the present case the learned trial judge, having given the evidence before him the maximum evaluation before calling for the defence, should have therefore focused on whether the defence had cast a reasonable doubt in the prosecution's case and even if did not, whether as a whole the prosecution had proved its case beyond reasonable doubt before finding the appellants innocent or guilty for the offence as charged.

[41] In the instant case the first and second appellants relied on the defence of alibi while the third appellant denied committing the offence as charged and argued that the prosecution had failed to establish the identity of any of the appellants. In fact in their petitions of appeal and in the submissions of their learned counsel before us, the same issues were canvassed.

[33] Likewise, in the case at hand, the same issue on custody and control of the impugned drugs found in the said house and the issue of access by others of the said house had been earlier canvassed by the learned counsel and had been decided by the learned JC. We are of the view that without fresh evidence advance by the defence, the learned JC should restraint from revisiting his earlier finding.

[34] For all the reasons above stated, we allowed the public prosecutor's appeal. We set aside the order of acquittal and discharge in respect of the first charge and substituted it with an order that the respondent be convicted of the trafficking charge. We ordered the respondent to be sentenced to death by hanging.

Appeal allowed; order of acquittal and discharge in respect of first charge set aside and substituted with order of conviction; respondent sentenced to death by hanging.

Reported by Dzulqarnain Ab Fatar